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FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

Fredric D. Woocher, Esq.
Strumwasser & Woocher
1000 Wilshire Boulevard, Suite 1900
Santa Monica, California 90401

RE: MURs 4389/4652
Orange County Democratic
Central Committee and
Edward R. Haskett, as treasurer

Dear Woocher:

Based on sua sponte submission received by the Commission on May 20, 1996 and a complaint filed on June 17, 1996, and information supplied by your clients, the Commission, on June 10, 1997, found that there was reason to believe your clients violated 2 U.S.C. §§ 433(a), 434(a), 441a(a)(1)(A), and 441d(a), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

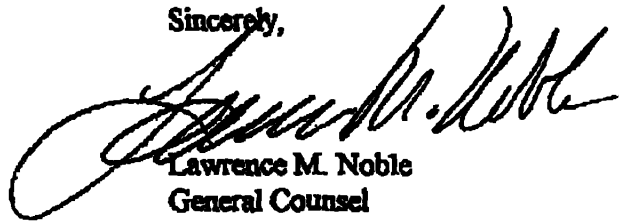
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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Eugene H. Bull, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence M. Noble", is written over the typed name and title.

Lawrence M. Noble
General Counsel

Enclosure
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MURs 4389 and 4652
Orange County Democratic Central Committee)	
and Zeke Hernandez, as treasurer)	

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was initiated by a sua sponte submission received from the Orange County Democratic Party and Central Committee on May 20, 1996, and a complaint received from Michael J. Schroeder on June 17, 1996, against the Orange County Democratic Central Committee and Zeke Hernandez, as treasurer (the "Democratic Committee" or the "Committee").¹ The sua sponte submission and the complaint alleged that James Toledano, Chairman of the Democratic Committee, produced and distributed a mailer which was coordinated with the Prince Committee and expressly advocated the election of Jim Prince; the mailer was produced and distributed with a \$10,000 contribution received from Debra LaPrade—the sister of Jim Prince—and her husband. Based on the information presented in the sua sponte submission, the complaint, and the responses, the Commission found reason to believe that the Democratic Committee violated 2 U.S.C. §§ 433(a), 434(a), 441a(a)(1)(A), and 441d(a). This Office is now prepared to recommend, on the basis of information obtained during the investigation, that the Commission find probable cause to believe the Democratic Committee violated the aforementioned sections of the Federal Election Campaign Act of 1971, as amended ("the Act").

¹ On August 8, 1997, the Commission received an amendment to the Committee's Statement of Organization, listing Zeke Hernandez as the current treasurer. Therefore, treasurer references in this brief are to Mr. Hernandez in accordance with Commission policy.

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II. FACTUAL AND LEGAL ANALYSIS

A. Overview

The Democratic Committee has not disputed that its Chairman coordinated the mailer with the Prince Committee, that the mailer was primarily devoted to express advocacy of the Prince candidacy, and that the mailer did not include the required disclaimer. Thus, it is uncontroverted that 2 U.S.C. §§ 441a(a)(1)(A) and 441d(a) were violated. At issue is whether the Democratic Committee is liable for these violations, as well as the violations of 2 U.S.C. §§ 433(a) and 434(a) which resulted from the activity of Jim Toledano.

B. Factual Summary

Sometime in February 1996, Debra LaPrade called the Democratic Committee and spoke with James Tolcdano about making a contribution.² During the conversation, Mr. Toledano identified himself as the Orange County Democratic Party Chairman and as an attorney. Ms. LaPrade recalls advising him that she and her husband wanted to make the contribution to the Democratic Committee to help it increase Democratic voter awareness and get the vote out.

By late February or early March of 1996, Mr. Toledano had received a \$10,000 contribution check from Debra and Paul LaPrade. To the best of his recollection, he received the contribution check at his law office. He stated that he had received other contributions to the Democratic Committee at his law office during his tenure as Chairman of the Committee. He deposited the check into an account at a bank where the Democratic Committee had banked at an earlier time. Mr. Toledano opened the account in the name of the Committee, but set up the

² Mr. Toledano's recollection is that he may have spoken to Ms. LaPrade on more than one occasion.

account with his as the sole required signature. He stated that he did not inform other members of the executive committee about the contribution and his plan to use it for the mailer.

Shortly before the March 26, 1996 primary election in California's 46th Congressional District, Mr. Toledano used the \$10,000 contribution to produce and distribute a mailer to the voters of the district, communicating the Democratic Committee's endorsement of Jim Prince. The mailer also urged citizens to vote on election day. The Prince Committee earlier had considered a plan to give money to the Democratic Committee to publicize its endorsement of Jim Prince but dropped the plan for lack of funds. In an affidavit submitted with his response in this matter, Mr. Toledano states that he called the Prince campaign and requested a photograph of Jim Prince. According to Mr. Toledano, an agent of the Prince campaign referred him to a photographer who ultimately delivered the requested photograph for use in the mailer which was primarily devoted to express advocacy of the Prince candidacy. The Prince Committee reported the mailer as an in-kind contribution on its 1996 April Quarterly Report, after the facts which later became the substance of the allegations herein received press coverage.

Mr. Toledano stated that he saw the mailer as an opportunity to advance the Committee's purpose in Central Orange County. He disclosed that he used vendor lists which he kept at home and had compiled in his capacity as Chairman of the Committee, to select the vendors used in connection with the mailer. Mr. Toledano further stated that he used the Committee's bulk mail number and account, asserting that such use of the bulk mail number and account was routinely allowed by the Committee, so long as the person or persons using them were doing something that was seen to be in the Committee's interest. He recalled that candidates and individuals who were not personnel of the Committee were permitted to use the bulk mail number and account at

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various times. According to him, one needed only to put money into the account and tell the post office to use it for the bulk mailing.

Overall, in conversations with the General Counsel's Office, Mr. Toledano portrayed the executive committee as "divided, dysfunctional, ineffective, and obstructive," and its treasurer as "unreliable." He stated that he feared disclosure of the LaPrades' contribution and his plans for the mailer would have ruined the opportunity to produce and distribute it. Moreover, Mr. Toledano defended his lack of disclosure on grounds that the Democratic Committee consistently ignored its by-laws, purportedly making irrelevant anything in them which might seem to govern his actions. Furthermore, he claimed that the Committee has a history of electing rich chairmen and essentially letting them do what they want. He remarked that those chairmen have generally "run the Committee out of their pockets," citing the Committee's Chairman from 1991-1993 as an example. According to Mr. Toledano, that Chairman raised over \$450,000 for the party and allocated the money as he saw fit. Mr. Toledano asserted that others had done the same as far back as the 1960s.

C. Applicable Law

The Act limits to \$1,000 per election the amount which any person may contribute to a candidate and his or her political committee; and limits to \$5,000 per calendar year the amount which any person may contribute to any political committee—other than political committees established and maintained by a national party, which are not the authorized political committees of any candidate. 2 U.S.C. § 441a(a)(1)(A) and (C).

Expenditures which are made by any person, including a political committee, "in coordination, consultation or concert with, or at the request or suggestion of, a candidate, his authorized committee or their agents" are considered in-kind contributions to that candidate.

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2 U.S.C. § 441a(a)(7)(B)(i). Thus, "[a] communication made in coordination with a candidate presumptively confers 'something of value' received by the candidate so as to constitute an attributable [in-kind] 'contribution.'" Advisory Opinion 1988-22.

Section 441d(a) requires that any person making an expenditure for a communication expressly advocating the election or defeat of a candidate must include a statement in the communication stating who has paid for the communication and whether or not it has been authorized by the candidate and/or his or her authorized committee.

Section 431(4)(C) defines "political committee" as any local committee of a political party which receives total contributions in excess of \$5,000 during a calendar year, or makes total payments exempted from the definition of contribution or expenditure as defined by 2 U.S.C. § 431(8) and (9) in excess of \$5,000 during a calendar year, or makes total contributions or expenditures in excess of \$1,000 during a calendar year. Political committees must register with the Commission and file periodic reports of their receipts and disbursements. 2 U.S.C. §§ 433(a) and 434(a).

The Commission's regulation at Section 109.1(b)(5) defines an agent as any person who has actual authority, either express or implied, to make or authorize the making of expenditures on behalf of a candidate, or who holds a position within the campaign organization that reasonably appears to confer such authority. Under California law, express authority is conferred upon an agent by an intentional grant of authority, and implied authority may be conferred by want of ordinary care—that is, the principal allows the agent to believe himself to possess the requisite authority. Cal.Civ.Code § 2316, *Columbia Outfitting Co. v. Freeman*, 36 Cal.2d 216, 223 P.2d 21, 23 (1950).

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A principal who grants an agent express or implied authority is responsible for the agent's acts within the scope of his or her employment. *See Weeks v. United States*, 245 U.S. 618, 623 (1918); *see also Rouse Woodstock, Inc. v. Surety Federal Savings & Loan Ass'n*, 630 F. Supp. 1004, 1010-11 (N.D. Ill. 1986) (principal who places agent in position of authority normally must accept agent's abuse of that authority). When an agent acts within the scope of his authority, a principal cannot escape responsibility on the grounds that he lacked knowledge of the agent's actions, or that the agent's actions were unauthorized, tortious, or even unlawful. 3 Am. Jur. 2d Agency § 280 at 783.

Further, a principal who holds out the agent as one having authority or permits the agent to represent that he has authority, so that a reasonable person would believe the agent to have such authority, may also be liable for the agent's actions on the basis of the agent's apparent authority. *See, e.g., Metco Products, Inc., Division of Case Mfg. Co. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989). Apparent authority commonly exists where a principal appoints an agent to a position with generally recognized duties or responsibilities. *See Restatement (Second) of Agency* § 27 at 104 ("apparent authority can be created by appointing a person to a position such as that of manager or treasurer, which carries with it generally recognized duties"). A principal may be held liable based on apparent authority although his agent's acts are unauthorized. *Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993).

In the past, the Commission has held members of the regulated community liable for the acts of their agents. *See* MURs 2602 and 3585. Moreover, the Commission has held a committee responsible for its agent's actions even when the agent acted negligently, and contrary to express instructions. For example, in AO 1992-29, the Commission instructed a committee to refund contribution checks that an employee had left in a drawer until after the 10-day deposit

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requirement expired. The employee acted without the treasurer's knowledge and in conflict with express instructions issued to committee personnel. Nonetheless, since the employee was the committee's agent authorized to receive contributions, the committee was deemed to have received the checks on the date the employee received them.

D. Analysis

A political committee is an artificial entity, and therefore, it must necessarily act through individuals or agents. Further, case law firmly establishes the liability of an entity or principal for the acts of its agent within the scope of his or her employment. *See Weeks v. United States*, 245 U.S. 618, 623 (1918); *see also Rouse Woodstock, Inc. v. Surety Federal Savings & Loan Ass'n*, 639 F. Supp. 1004, 1010-11 (N.D. Ill. 1986). In this matter, Mr. Toledano, the elected Chairman of the Democratic Committee, acted in its name and on its behalf to communicate its endorsement of a federal candidate. Specifically, Mr. Toledano was the Democratic Committee's agent acting—within the scope of his employment—with express or implied authority, and apparent authority.

Evidence which supports the conclusion that Mr. Toledano acted with express or implied actual authority is found initially in a statement he made in his response to the complaint notification. He states, "I took the money as Chair of the Party, *acting within my discretion as I understood it from the acts of my predecessors as Chair of the Orange County Democratic Party and according to my understanding of the By-laws of the Central Committee.*"³ (emphasis added). It is clear from this statement that Mr. Toledano believed he possessed the requisite

³ It should be noted that the Committee has failed to avail itself of the opportunity to provide the Commission with a copy of its by-laws, despite multiple requests by the General Counsel's Office.

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authority to act for the Committee in the manner he did. Moreover, the Democratic Committee has apparently conceded that Mr. Toledano was acting within the scope of his authority, because they argue that Mr. Toledano did not obtain the requisite approval to engage in the activities at issue, and not that he could not engage in such activities under any circumstances. The Committee's silence on this point is some evidence of Mr. Toledano's authority, express or implied, to engage in the kinds of activity at issue. In addition, the information on hand includes evidence that the Committee conferred an implied actual authority upon Mr. Toledano through a history of ignoring its by-laws and allowing Chairmen to "run the Committee out of their pockets." Thus, whether by intent or by want of ordinary care, it appears that the chairmen of the Democratic Committee historically were given wide latitude to raise and expend funds in the name of the organization.

Consistently, Mr. Toledano states that the LaPrades' contribution was not the first time that he had received a contribution on behalf of the Committee. To the best of his recollection, in this as in previous instances, the contribution to the Democratic Committee was delivered to his private law offices. Thus, the Committee should not now find it surprising that Mr. Toledano reasonably believed that he could accept contributions on behalf of the Democratic Committee and expend them in the Committee's interest.

Further, since the Committee held out Mr. Toledano, as its Chairman, as one having authority, or otherwise permitted him to represent that he had authority, the Committee is also liable on the basis of his apparent authority. As stated previously, apparent authority commonly exists where a principal appoints an agent to a position with generally recognized duties or responsibilities. See Restatement (Second) of Agency § 27 at 104. Mr. Toledano's duties, as Chairman, certainly included the advancement of the party's interest through the promotion of its

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candidates. In making their contributions, the LaPrades obviously believed in the apparent authority of Mr. Toledano to accept and expend money in the name of the Democratic Committee. Counsel for the LaPrades states in their response that Debra LaPrade called Mr. Toledano at the Orange County Democratic Party. The LaPrades counsel further states that Mr. Toledano identified himself as the "party chairman and as an attorney" and that "Debra LaPrade was led to believe that the Democratic party [sic] would decide how to effectively utilize their party donations and she therefore left that matter to the good judgment of the Democratic party and its party chairman."

The bank where Mr. Toledano deposited the LaPrades' contributions, and the vendors with whom Mr. Toledano dealt in producing and distributing the mailer, also believed in his apparent authority. There is no evidence that any of the vendors used in connection with producing and distributing the mailer ever questioned whether Mr. Toledano had the authority to act for the Democratic Committee. Similarly, although the contribution check from the LaPrades was made out to the Democratic Committee, there is no evidence that Mr. Toledano was questioned when he deposited the contribution check into a new account which he had opened at a bank where the Committee had at one time transacted business. This particularly suggests the bank's belief in Mr. Toledano's apparent authority because Mr. Toledano set up the account with his as the sole required signature.

The Democratic Committee has argued that because Mr. Toledano acted without obtaining its approval or that of its treasurer in connection with receiving and expending the contribution from the LaPrades, and because it was unaware of Mr. Toledano's actions, it should not be held liable for them. Contrary to what this argument assumes, the Committee's liability for Mr. Toledano's actions does not hinge on its awareness or approval of them. Quite the opposite,

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if Mr. Toledano acted within the scope of his authority, the Committee cannot escape liability on the grounds that it lacked knowledge of his actions, or that his actions were unauthorized, tortious, or even unlawful. *See* 3 Am. Jur. 2d Agency § 280 at 783. As has already been stated, Mr. Toledano certainly acted within the scope of his authority by accepting money to promote the Committee's candidates. The Democratic Committee's silence on this point, which appears to indicate it concedes that Mr. Toledano acted within the scope of his authority, was previously noted.

On the basis of the foregoing, the Democratic Committee either conferred express authority upon Mr. Toledano, or more certain, implied authority through a pattern of allowing chairmen of the Committee wide latitude to handle receipt of contributions and making of expenditures. Additionally, by holding out Mr. Toledano as having authority or permitting him to represent that he had authority so that several persons reasonably believed that such authority existed, the Committee is also liable for Mr. Toledano's actions on the basis of his apparent authority.

Mr. Toledano received \$10,000 from the LaPrades and made expenditures on the mailer that were in-kind contributions in excess of \$1,000 dollars, in connection with federal elections. The receipt of a contribution in excess of \$5,000, or the making of expenditures or contributions in excess of \$1,000, qualified the Democratic Committee for political committee status. *See* 2 U.S.C. § 431(4)(C). As a political committee, the Democratic Committee was required to register with the Commission and file periodic reports of its receipts and disbursements. *See* 2 U.S.C. §§ 433(a) and 434(a). Because it failed to meet these requirements of the Act, it violated 2 U.S.C. §§ 433(a) and 434(a).

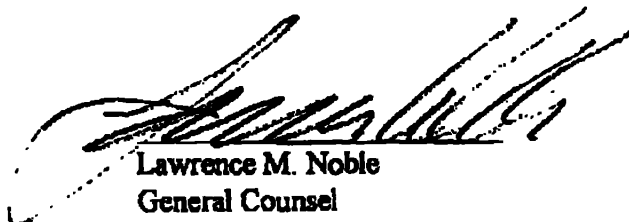
Further, the Democratic Committee exceeded the Act's limitation on the amount of money a person may contribute to a candidate. *See* 2 U.S.C. § 441a(a)(1)(A). The contribution which the LaPrades made to the Democratic Committee totaled \$10,000. Mr. Toledano deposited this full amount into the new bank account he opened in the name of the Democratic Committee. From all indications, the entire \$10,000 contribution was then used to finance the production and distribution of the mailer that expressly advocated the Prince candidacy.

Moreover, there was coordination between the Democratic Committee and the Prince campaign in the production phase of the mailer. As noted earlier, Mr. Toledano states that he called the Prince campaign and requested a photograph of Jim Prince that was ultimately delivered to him by a photographer who was referred by an agent of the Prince campaign. This same photograph was used in the mailer which expressly advocated the Prince candidacy. Accordingly, the Democratic Committee violated 2 U.S.C. § 441a(a)(1)(A) in connection with the mailer expressly advocating the Prince candidacy. Further, it violated 2 U.S.C. § 441d(a) because the mailer did not include the appropriate disclaimer although it expressly advocated the Prince candidacy.

III. GENERAL COUNSEL'S RECOMMENDATION

Find probable cause to believe that the Orange County Democratic Central Committee and Zeke Hernandez, as treasurer, violated 2 U.S.C. §§ 433(a), 434(a), 441a(a)(1)(A), and 441d(a).

3/18/98
Date


Lawrence M. Noble
General Counsel

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